SUPREME COURT, U.S.
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No. 94-721

In The Supreme Court of the United States

October Term, 1994

USX CORPORATION,

Petitioner,

v.

LESLIE RAY COX, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER USX CORPORATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

MICHAEL L. LUCAS
BURR AND FORMAN
3000 SouthTrust Tower
Birmingham, AL 35203
(205) 251-3000

J. MICHAEL JARBOE
USX CORPORATION
600 Grant Street
Pittsburgh, PA 15219
(412) 433-2880

LEONARD L. SCHEINHOLTZ*
ROBERT W. HARTLAND
REED SMITH SHAW & MCCLAY
435 Sixth Avenue
Pittsburgh, PA 15219
(412) 288-3178/3158

**Counsel of Record for Petitioner USX Corporation*

DISCLOSURE STATEMENT PURSUANT TO RULE 29.1

Petitioner USX Corporation ("USX") herein incorporates the disclosure statement set forth in its petition for writ of certiorari.

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ARGUMENT

Respondents' Brief in Opposition ("*Opp.*") appears calculated to convince the Court that a waiver of the attorney-client privilege is necessary in this case to avoid unfairness to Respondents. Respondents, however, were not content to construct their unfairness argument on the existing record, or on the actual holding of the Eleventh Circuit, since their Opposition grossly misstates both in material respects.[1]

Respondents' strategy is capsulized in their reformulation of the question presented in this proceeding. That reformulation contains not just one, but multiple diversionary misstatements. First, it makes reference to USX's alleged creation of "self-serving documents". In fact, neither the district court, nor the Eleventh Circuit, found any document to be "self-serving". The district court specifically rejected this contention, stating: "Although plaintiffs claim the disclosures are 'self-serving', the court does not find them so." USX App. B at 101a. The Eleventh Circuit did not disturb this finding. USX App. A at 65a-69a. More importantly, contrary to Respondents' blatant misstatement of the holding of the Eleventh Circuit, *Opp.* at 14, 19, alleged self-serving documents played no role whatsoever in the Eleventh Circuit's holding.

Next, Respondents' reformulation of the question presented states that the alleged self-serving documents were contrived as they were created "with a view" to later establishing USX's

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[1]Additionally, Respondents' Opposition contains numerous misstatements regarding underlying facts. For the most part, those misstatements are immaterial to the question presented for review, and, where so, will be ignored here.

intent to comply with the law. There exists not one shred of evidentiary support for such a statement and, of course, Respondents provide no record citation for this claim. Moreover, again, this notion of contrived, cover-up documents played no role at all in the holding of either the district court or circuit court.

Respondents' question reformulation proceeds to refer to USX's "voluntarily" producing "those self-serving exculpatory documents". In reality, however, aside from a few privileged documents inadvertently produced by USX—and regarding which (like all other attorney-client communications) USX has stated unequivocally that it will not rely on at trial—there was nothing at all voluntary about the production of these documents. All the discovery responses now complained of by Respondents — whether they be answers to deposition questions, answers to interrogatories, document production or responses to requests for admissions—were responses to specific inquiries of the Respondents. USX was obligated to provide the information requested in accordance with the Federal Rules of Civil Procedure.

Finally, Respondents' reformulation of the question presented suggests that the waiver finding here was necessary so that Respondents can "rebut and challenge defendants' good faith defense." As a matter of fact, however, USX has never asserted any defense of "good faith" in this case, and USX expressly has disclaimed any reliance upon any attorney-client communication in its defense.

Despite Respondents' efforts at mischaracterization, there is no issue of unfairness presented here to begin with, beyond that which is inherent in the protections afforded by the attorney-client privilege. The legality of the "state of mind" waiver doctrine adopted by the Eleventh Circuit is what is at issue here. Respondents' attempts to ignore, or factually distinguish, the conflicting circuit court opinions on this fundamental issue of privilege are unpersuasive.

I. Respondents Mischaracterize the Record and Misstate the Eleventh Circuit's Holding.

Respondents begin with the argument that the petition should be denied because "it is premised on the erroneous assertion that the Eleventh Circuit found a waiver 'from nothing more than argument of counsel in legal memoranda.' " *Opp.* at 12. In fact, the Eleventh Circuit **did** find a waiver on the basis of argument of counsel in legal memoranda and nothing more. *See* USX App. A at 65a-66a. More specifically, the Eleventh Circuit cited two such memoranda, and nothing else. The Court's decision on this point is unambiguous, and Respondents' attempt to recast the Eleventh Circuit's rationale is entirely unsupported by a straightforward reading of the decision.

Respondents next maintain that the petition should be denied because "USX has repeatedly asserted a good faith defense." *Opp.* at 12 (emphasis in the original). In fact, as noted above, USX has **never** asserted a "good faith" defense, and Respondents cite no record evidence to the contrary. Indeed, the term "good faith" does not even appear in the legal memoranda referenced by Respondents. More to the point, and as recognized both by the Eleventh Circuit and the district court, **USX consistently has renounced any intent to rely upon a defense of advice of counsel, or to rely upon any privileged attorney-client communications in its defense.** USX App. A at 65a; USX App. B at 97a. This most fundamental of points is entirely ignored by Respondents.

Respondents, instead, attempt to make much of certain documents produced by USX during the course of the litigation. The apparent intent is to support an "unfairness" claim by accusing USX of the intentional creation of self-serving, "cover-up" type attorney-client communications which USX then, allegedly, voluntarily injected into the litigation. This argument is entirely specious for a variety of independent reasons:

1. To begin with, and most fundamentally, Respondents' contention that the Eleventh Circuit somehow premised its holding upon these documents, *Opp.* at 14, 19, is simply wrong. They played no role whatsoever in the Eleventh Circuit's holding on this issue. The Eleventh Circuit, like the district court, found a waiver of the attorney-client privilege by *USX's* assertion in legal memoranda that it believed its conduct was legal when engaged in. The propriety of that "state of mind" waiver doctrine is the issue here, plain and simple.

2. The various documents cited by Respondents were either not privileged or, if privileged, were produced inadvertently.

3. There exists no evidence to support Respondents' claim that self-serving attorney-client communications were created as part of some "cover-up", and neither the district court nor the circuit court made any such finding with respect to any document.

4. Finally, since USX expressly disclaimed any intent to rely on any privileged communication in its defense, Respondents' entire theory of an improper and prejudicial use of such communications during trial makes no sense. Similarly, in light of this unambiguous disclaimer by USX, Respondents' statement in their Opposition that such documents "will undoubtedly be placed before the jury", *Opp.* at 14, is simply wrong.

In addition to documents, Respondents in their Opposition also refer to certain deposition testimony given by USX witnesses wherein the witness made reference to having received "advice from counsel". Such references in no way advance Respondents' claim here. When these discovery responses were

given they were given in answer to direct inquiries of Respondents, and the witnesses were required to factually answer the questions presented.[2] As the district court succinctly explained:

> When defendants in this action responded to certain of plaintiffs' discovery requests with statements that they relied upon advice of counsel in certain circumstances, they were not raising a defense, they were stating a fact.

USX App. B at 97a.

Moreover, and more fundamentally, Respondents' suggestions that USX unfairly will rely upon such "advice of counsel" testimony at trial is incorrect. USX consistently has represented that it will not do so.

II. Respondents' Denial of a Circuit Conflict is Wrong.

Respondents attempt to argue away a direct circuit court conflict through the device of misstating the issue presented by this controversy. Specifically, Respondents suggest that USX intends to rely at trial upon advice of counsel or one or more attorney-client communications. If this were true, (and as noted above, it plainly is not) and if the Eleventh Circuit's holding was based on such conduct, there would be nothing remarkable about this Eleventh Circuit ruling. The circuit courts are uniform in their position that a waiver of the attorney-client privilege occurs in such circumstances.

Notwithstanding Respondents' efforts to mischaracterize the Eleventh Circuit's ruling, the decision below is not such a mainstream waiver holding. The district court and the Eleventh Circuit found a waiver of the attorney-client privilege here after fully acknowledging that USX did not intend to assert a defense

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[2]Counsel for USX, of course, did not permit any further or follow-up questioning as to the substance of any advice the witness received from counsel.

of reliance upon advice of counsel and conceding that USX did not intend to rely upon a single attorney-client communication in its defense. The sole basis for the waiver holding was USX's allegedly injecting its "state of mind" (*i.e.*, knowledge of the law) into the case when it stated that it believed its conduct was legal when engaged in. In its holding, the Eleventh Circuit plainly and expressly aligned itself with those courts which have adopted this state of mind waiver doctrine first announced in *Hearn v. Rhay*, 68 F.R.D. 574 (E.D. Wash. 1975).

Just as clearly, the Third Circuit in *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851 (3d Cir. 1994), expressly rejected *Hearn v. Rhay* and its progeny as being of "dubious validity". In the Third Circuit it is clear that the attorney-client privilege will be waived only where the litigant asserts a claim or defense and discloses or describes a privileged communication in support of that claim or defense. Since it is indisputable that USX will not disclose or describe any privileged communication in the trial of this case, it is quite clear that no waiver would be found in the Third Circuit. Respondents have not and cannot "distinguish away" this direct conflict.[3]

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[3]Respondents attempt to distinguish *United States v. White*, 887 F.2d 267 (D.C. Cir. 1989), by characterizing that case as involving the mere denial of intent. Respondents argue that USX went "beyond mere denial of intent to assert that it believed that its conduct was legal." *Opp.* at 18. Ignored by Respondents, however, is the fact that in *United States v. White*, White not only denied intent but also asserted (as USX did here) that he **believed** his conduct was legal. 887 F.2d at 270. Similarly, Respondents attempt to harmonize the Eleventh Circuit's decision here with the Second Circuit's decision in *United States v. Bilzerian*, 926 F.2d 1285 (2d Cir.), *cert. denied*, 112 S.Ct. 63 (1991). The fact remains, however, that, in *Bilzerian*, the court held that counsel was free to argue "good faith" (*i.e.*, a belief in the legality of challenged conduct) in opening or closing statements without fear of a waiver of the attorney-client privilege. Respondents do not—and cannot—explain how such statements differ from statements of counsel in legal memoranda, as are at issue here.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the petition, the petition for a writ of certiorari should be granted.

MICHAEL L. LUCAS
BURR AND FORMAN
3000 SouthTrust Tower
Birmingham, AL 35203
(205) 251-3000

J. MICHAEL JARBOE
USX CORPORATION
600 Grant Street
Pittsburgh, PA 15219
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LEONARD L. SCHEINHOLTZ*
ROBERT W. HARTLAND
REED SMITH SHAW & MCCLAY
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(412) 288-3178/3158

**Counsel of Record for Petitioner, USX Corporation*